

1 MANISH KUMAR (CSBN 269493)
ALBERT B. SAMBAT (CSBN 236472)
2 SUSAN A. MUSSER (MOBN 63116)
ASHLEY EICKHOF (CSBN 307143)
3 U.S. Department of Justice
4 Antitrust Division
450 Golden Gate Avenue
5 Box 36046, Room 10-0101
San Francisco, CA 94102
6 ashley.eickhof@usdoj.gov
7 Telephone: (415) 934-5300

8 Attorneys for United States of America

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA

14 v.

15 ALVIN FLORIDA, JR.,
16 ROBERT ALHASHASH RASHEED,
17 JOHN LEE BERRY, III,
18 REFUGIO DIAZ, and
STEPHAN ALEXANDER FLORIDA,

19 Defendants.
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CASE NO. CR 4:14-00582 PJH

**UNITED STATES' OPPOSITION TO
DEFENDANTS' JOINT PROPOSED JURY
INSTRUCTIONS**

Pretrial Conference: October 12, 2016
Court: Hon. Chief Judge Phyllis J. Hamilton
Trial Date: October 31, 2016

1 In response to the Court's pretrial order (dkt. 223), the United States respectfully submits the
2 following objections to the defendants' joint proposed jury instructions.

3 ARGUMENT

4 **I. The Court Should Not Give Defendants' Jury Instruction No. 1 Regarding Expert** 5 **Testimony**

6 Defendants' first proposed jury instruction relates to expert testimony. Their first motion *in*
7 *limine* seeks to admit what is presumably expert testimony regarding an analysis of auction sale prices.
8 Defendants' Joint Motions in Limine, dkt. 236, at 2. Defendants, however, have not yet noticed an
9 expert witness under Federal Rule of Evidence 702. The government objects to such testimony for the
10 reasons stated in its opposition to defendants' motion *in limine*. Such testimony is irrelevant under the
11 *per se* standard that this Court has ruled applies to this case. It also would lack an evidentiary basis for
12 admission, be unreliable, and risk compromising the jury's verdict with prejudicial and irrelevant
13 evidence. Because the government objects to such testimony, the government requests that this
14 instruction not be given.

15 **II. Defendants' Jury Instruction No. 2 Is Unnecessary Because the Parties Have Jointly** 16 **Proposed Equivalent Instructions**

17 Defendants' second proposed instruction contains a preamble generally describing the posture of
18 the case, to which the government does not object. The substantive portion of the instruction—which
19 the government does object to—is as follows:

20 **Separate Crime, Separate Consideration**

21 A separate crime is charged in Count One against each named defendant. You must
22 reach a separate unanimous decision on the elements of Count One against each named
23 defendant.

24 Although the defendants are being tried together, you must give separate consideration to
25 each defendant. In doing so, you must determine which evidence in the case applies to
26 each defendant, disregarding any evidence admitted solely against some other defendant.
27 The fact that you may find one of the defendants guilty or not guilty should not control
28 your verdict as to any other defendant.

26 You are only to determine whether each defendant is guilty or not guilty of the charge
27 against him in the Indictment. Your determination must be made only from the evidence
28 in the case. The defendants are not on trial for any conduct or offenses not charged in the
Indictment. You should consider evidence about the acts, statements, and intentions of
others, or evidence about other acts of a defendant, only as they relate to the charge
against each defendant.

1 The unanimity requirement in the first paragraph is reflected in several of the Court’s standard jury
2 instructions, all of which the parties have jointly proposed. For example, the 2010 Ninth Circuit Model
3 Criminal Jury Instruction 7.1 (“Model”) states, “Your verdict, whether guilty or not guilty, must be
4 unanimous.” The verdict form instruction (Model Instruction 7.5, Joint Instruction 36) similarly refers
5 to “unanimous agreement on a verdict.” Thus, the proposed language is unnecessary because it will be
6 reflected in other instructions that the Court will give to the jury.

7 With regard to the second paragraph proposed above, the parties have jointly proposed an
8 equivalent instruction, Model Instruction 2.7:

9 JOINT INSTRUCTION NO. 12
10 SEPARATE CONSIDERATION FOR EACH DEFENDANT

11 Although the defendants are being tried together, you must give separate consideration to
12 each defendant. In doing so, you must determine which evidence in the case applies to
13 each defendant, disregarding any evidence admitted solely against some other defendants.
14 The fact that you may find one of the defendants guilty or not guilty should not control
15 your verdict as to any other defendants.

16 Dkt. 244 at 16. Similarly, the parties have jointly proposed an equivalent instruction to the third
17 paragraph above, Model Instruction 3.10:

18 JOINT INSTRUCTION NO. 26
19 ACTIVITIES NOT CHARGED

20 You are here only to determine whether the defendants are guilty or not guilty of the
21 charges in the indictment. The defendants are not on trial for any conduct or offense not
22 charged in the indictment.

23 Dkt. 244 at 30. The language proposed by defendants is an unnecessary departure from the
24 Model Instructions. Moreover, repetitive instructions regarding basic aspects of the trial risk
25 juror confusion. Defendants’ requested instruction should not be given.

26 **III. The Defendants’ General Conspiracy Instruction Improperly Deviates from the Model and**
27 **Erroneously Includes an Overt Act Requirement**

28 Defendants base their general conspiracy instruction on Model 8.20, but with two important
deviations to which the government objects. First, defendants materially changed the first element of a
conspiracy. Their proposed instructions reads, in relevant part, “First . . . *the defendant made an*
agreement with one or more persons to suppress and restrain competition by rigging bids to obtain
hundreds of selected properties offered in public auction in Alameda County in reasonable [sic] restraint

1 of trade and commerce as charged in the indictment.” Defendants’ Joint Proposed Jury Instructions, dkt.
2 240 at 4 (emphasis added). This is an incorrect statement of the law. The equivalent, unmodified
3 language in Model Instruction 8.20 reads as follows: “First, beginning on or about [date], and ending on
4 or about [date], there was an *agreement between two or more persons* to commit at least one crime as
5 charged in the indictment.” Ninth Cir. Model Instruction 8.20 (2010) (emphasis added). Defendants’
6 instruction would mislead the jury into thinking that each defendant must have directly participated in
7 the formation of the conspiracy, when all that is legally required is that a defendant knowingly joined the
8 charged conspiracy. *See United States v. Perry*, 550 F.2d 524, 529 (9th Cir. 1977) (“Once a conspiracy
9 has been found to exist, only slight evidence is necessary to connect a defendant to it. . . . The
10 government does not have to prove that all of the defendants met together at the same time and ratified
11 illegal scheme.”). Defendants’ formulation of this element also contains an awkward recitation of the
12 object of the conspiracy, where the Model more concisely references the “crime as charged in the
13 indictment.” This language also suggests that the reasonableness of the restraint on trade and commerce
14 is an issue, which it is not because this is a *per se* bid-rigging case. Should the Court be inclined to give
15 Model Instruction 8.20, the government requests that the Court instruct the jury on this element based on
16 the original language contained in the Model.

17 Second, defendants’ proposed instruction erroneously contains an overt act requirement. The
18 commentary to Model 8.20 reads, “Use the third element in this instruction only if the applicable statute
19 requires proof of an overt act.” The Sherman Act, 15 U.S.C. § 1, has no overt act requirement. *United*
20 *States v. Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985) (“An indictment charging a violation of section one
21 of the Sherman Act is not required to allege any overt act Because the Sherman Act punishes the
22 mere act of conspiring, overt acts in furtherance of the conspiracy need not be alleged.”). Accordingly,
23 this element and the last paragraph of the proposed instruction concerning the legality of an overt act
24 should be stricken.

25 Following the elements of a criminal conspiracy, Model Instruction 8.20 contains a general legal
26 description of a conspiracy. Defendants’ proposed instruction unnecessarily alters this general
27 description. First, this portion of defendants’ instruction begins, “I will now explain to you the elements
28 of a conspiracy.” This preamble does not appear anywhere in the model and furthermore is incorrect

1 because the elements of a conspiracy have just been described. Defendants' version of the instruction
2 also deletes the following italicized clause from the first sentence of the paragraph: "One becomes a
3 member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or
4 further some object or purpose of the conspiracy, *even though the person does not have full knowledge*
5 *of all the details of the conspiracy.*" Model Instruction 8.20. There is no legal justification for omitting
6 this language. The government objects to this deletion.

7 The government does not oppose defendants' request for a general instruction regarding the
8 elements a criminal conspiracy, but requests that the Court instruct the jury using the original,
9 unmodified language of the Model instruction without the overt act paragraphs.

10 **IV. A Multiple Conspiracies Instruction Should Not Be Given**

11 The government opposes a jury instruction on multiple conspiracies. The defendants' theory of
12 multiple conspiracies, at least as articulated in their objections to the government's coconspirator
13 statements notice, appears to be that each bid-rigged property must constitute a separate conspiracy
14 because different individuals participated in each auction and because each foreclosure sale is a discrete
15 financial transaction. *See* Defendants' Objections to the Government's Notice of Co-Conspirator
16 Statements ("Objections"), dkt. 227 at 13-14 ("In reality, each time the 'conspirators' bid at public
17 auction, that action constituted a different conspiracy."). But this theory of multiple conspiracies is
18 unsupported by the law and will have no foundation in the evidence at trial. It is of no moment that the
19 conspiracy involved separate bid-rigging agreements at various auctions. "[A] single conspiracy may
20 involve several subagreements of competitors." *United States v. Tille*, 729 F.2d 615, 621 (9th Cir.
21 1984). *See generally* *United States v. Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979) (quoting *Perry*, 550
22 F.2d at 533 ("the jury could find that there were several different agreements involving the defendants,
23 all of which would then connect the defendants to the general overall conspiracy as charged in the
24 indictment")). Thus, the fact that conspirators agreed in various instances to refrain from bidding during
25 a proper auction cannot serve as a basis for a multiple conspiracies instruction.

26 Defendants also assert that "[e]ach alleged conspiracy started and 'terminated' when the property
27 was sold to whichever individuals participated in the public auction at that particular and time."
28 Objections, dkt. 227 at 15. But the evidence at trial will demonstrate that the rigged bids at the auctions

1 were not a series of disconnected transactions. In the Ninth Circuit, courts look at several factors to
2 determine whether there was a single conspiracy, including “the nature of the scheme; the identity of the
3 participants; the quality, frequency, and duration of each conspirator’s transactions; and the
4 commonality of time and goals.” *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984).
5 “Typically, the inference of an overall agreement is drawn from proof of a single objective . . . or from
6 proof that the key participants and the method of operation remained constant throughout the
7 conspiracy.” *United States v. Fernandez*, 388 F.3d 1199, 1226 (9th Cir. 2004), *modified*, 425 F.3d 1248
8 (9th Cir. 2005).

9 Here, while the exact participants in any single rigged auction could vary, defendants
10 participated in a series of bid-rigging acts in Alameda County beginning in 2008 and continuing through
11 2011. At trial, the evidence will show that a regular group of bidders—repeat players at the auctions—
12 took part in the bid rigging, admitted to engaging in bid rigging during the same time period as
13 defendants and at the very same location as defendants on a regular basis, and have implicated
14 defendants. The fact that each property was generally rigged separately does not alter the analysis.
15 “The general test also comprehends the existence of subgroups or subagreements.” *United States v.*
16 *Arbelaez*, 719 F.2d 1453, 1457-58 (9th Cir. 1983). Indeed, in price-fixing and bid-rigging cases, it is not
17 uncommon for the coconspirators to reach discrete agreements (concerning, for example, different
18 products, pricing changes, or bids) as part of the scheme. Here, the method of operation of the
19 conspiracy remained constant: While there were some straight payoff agreements (typically, where
20 there were only two coconspirators involved), for the most part, defendants and their coconspirators held
21 “rounds”—secondary private auctions—hundreds of times. The conspirators certainly did not come up
22 with the elaborate practices surrounding rounds (such as different bidders “insuring” each other) anew
23 each time they agreed to rig a particular auction. These practices were already established by the
24 conspiracy members. Additionally, members of the conspiracy kept ledgers to track how much money
25 they owed each other over time and then met with the defendants to reconcile accounts—another fact
26 showing that this was not a series of disconnected transactions. And, the conspirators had the same
27 financial objective in participating in the bid-rigging conspiracy—purchasing the properties at
28 noncompetitive prices and receiving payoffs at the rounds.

1 In support of their multiple conspiracies theory, defendants also argue that “the evidence will
2 show that the defendants, as well as their purported coconspirators, acted at variance and
3 antagonistically to one another at the public auctions.” Objections at 15. But even assuming such
4 evidence exists, that would not warrant a multiple conspiracies instruction. The fact that defendants
5 and coconspirators at times competed against each other is legally irrelevant. Because bid rigging is a
6 *per se* violation under the Sherman Act, there is no requirement that a criminal bid-rigging conspiracy
7 eliminate all competition. Indeed, this very principle is reflected in defendants’ own proposed jury
8 instructions. *See* Defense Instructions, dkt. 240 at 8 (“It is not a defense that the conspirators actually
9 competed with each other in some manner or that they did not conspire to eliminate all competition.”);
10 *see also* 2009 American Bar Association Section of Antitrust Law’s *Model Jury Instructions in Criminal*
11 *Antitrust Cases* (“ABA Model”), Chapter 3(G) (Bid Rigging) at 61.

12 If the Court finds that a multiple conspiracies instruction is warranted, the government objects to
13 defendants’ formulation, which adds “or conspiracies” at various locations throughout Model Instruction
14 8.22. This language is cumbersome and risks juror confusion. The government therefore requests that
15 “or conspiracies” language be stricken. The government does not oppose the addition of the word
16 “unanimously” to the first sentence of this instruction to satisfy the specific unanimity requirement. *See*
17 Commentary, Model Instruction 7.9, Specific Issue Unanimity (“When the evidence establishes multiple
18 conspiracies, failure to give a specific unanimity instruction may be plain error and the court may have a
19 duty to *sua sponte* give the instruction requiring the jurors to unanimously agree on which conspiracy
20 the defendant participated in.” (citing *United States v. Lapier*, 796 F.3d 1090 (9th Cir. 2015))).

21 **V. Defendants’ Proposed Instruction No. 5 Regarding Bid Rigging Should Not Be Given, and**
22 **the Court Should Give the ABA Model Instruction Instead**

23 Defendants’ fifth proposed instruction is an edited version of an instruction given in *United*
24 *States v. Katakis*, No. CR S-11-511 WBS (E.D. Cal. 2014).¹ *Katakis* was a factually distinct bid-rigging
25 prosecution that involved evidence and defenses that may or may not be introduced in this trial. The
26 government proposes that the Court use the ABA Model Instruction on bid rigging, parts of which are

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28 ¹ For the Court’s reference, the original *Katakis* instructions are attached as Exhibit A and
relevant excerpts from the ABA Model Instructions as Exhibit B.

1 reflected in the *Katakis* instruction. The ABA Model Instructions generally are the most current,
2 generally accepted, neutral criminal antitrust instructions available. As such, they serve as a sound basis
3 for antitrust-specific instructions like bid rigging.

4 Defendants' modifications to the ABA Model Instruction are superfluous, confusing, and
5 misleading. The grand jury charged defendants with violating the Sherman Act by entering into
6 agreements not to compete with competitors at the auction. The grand jury did not charge defendants
7 with restraining competition by entering into a joint venture. If defendants show that the charged
8 conduct – agreements not to compete with horizontal competitors and subsequent rounds – are
9 legitimate joint ventures, then the government has not proven the alleged conspiracy because the
10 defendants were not horizontal competitors. Thus, the proposed instructions on bid-rigging are
11 sufficient alone. Defendants' additional proposed instruction is unnecessary and misleading, and the
12 ABA Model Instruction should be given instead.

13 **VI. Defendants' Proposed Instruction No. 6 Regarding Resales Need Not Be Given**

14 Defendants' proposed jury instruction is misleading. The instruction explains that a winning
15 bidder does not violate the Sherman Act by purchasing a property at a foreclosure sale and reselling
16 either the property or the right to purchase the property. This is not correct in every instance. If a
17 defendant first enters into an agreement not to bid and then participates in a second auction to "sell" the
18 right to purchase the property, the defendant has violated the Sherman Act. By suggesting that the jury
19 separately analyze the conduct of the defendants after the public auction without considering whether it
20 was contingent on an agreement not to bid, this instruction misleads the jury. The government objects to
21 its inclusion in the jury instructions.

22 **VII. The Defendants' Instruction No. 7 Regarding "Knowingly" Is Missing Several Elements**

23 Defendants' instruction deviates from the ABA Model Instruction by deleting several
24 unbracketed portions, presumably because they are not helpful to the defense case. The government has
25 proposed an unmodified version of the Ninth Circuit instruction instead. The term "knowingly" is not a
26 term specific to antitrust law, and given the direct authority from the Ninth Circuit, the government
27 requests that the jury be given the Model Instruction instead.

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1 **VIII. Response to Defendants’ Instruction No. 8 Regarding Interstate Commerce**

2 Defendants’ proposed jury instruction² tracks the ABA Model. The Ninth Circuit, however, has
3 provided additional guidance on proper jury instructions on interstate commerce in bid-rigging cases of
4 real estate. The government’s proposed jury instructions incorporate this additional guidance that
5 further refines the ABA Model Instructions.

6 The United States’ Instruction No. 10 provides that:

7 To decide whether the charged conspiracy was “in the flow” of interstate commerce, you
8 must determine whether the activities of the charged conspiracy were an essential part of
9 a real estate transaction across state lines. While real estate remains physically in one
10 state, money from real estate transactions can be in the flow of interstate commerce.
11 Funds in interstate commerce are considered in commerce until they reach the point
12 where their movement is intended to end. A temporary pause in their transit does not
13 necessarily mean that the funds are no longer in commerce – where there is a practical
14 continuity of movement, funds remain in commerce until they reach their final
15 destination. If you find that the rigged foreclosure sales at the Alameda County real estate
16 auctions were an essential part of interstate foreclosure transactions involving the transfer
17 of funds from the State of California to entities in other states, then the conspiracy is in
18 the flow of interstate commerce and therefore the interstate commerce element is proven
19 for the bid-rigging count. If the charged conspiracy occurs within the flow of interstate
20 commerce, whether the conspiracy affected that commerce is irrelevant. The amount of
21 funds transferred is also irrelevant.

22 This instruction is based primarily on the jury instructions given in *United States v. Guthrie*. 814
23 F. Supp. 942, 947 (E.D. Wash. 1993) (applying *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232 (1980)
24 and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) when instructing the jury on interstate
25 commerce). The allegations in *Guthrie* were that the defendant “attended and participated in the public
26 non-judicial foreclosure sales of real property located in Spokane, Washington, and “entered into
27 agreements with the other potential bidders that, in return for his payments to them, they would not bid
28 on the properties and he alone would bid.” *Id.* at 943-44. There the court instructed the jury, in part, on
interstate commerce as follows: “Funds in interstate commerce are considered in commerce until they
reach the point where their movement is intended to end. . . . While real estate remains physically in one
state, transactions related to real estate can be in the flow of interest commerce. To decide whether the

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² Defendants’ version of the instruction refers to interstate commerce as the “fourth” requirement rather than the third, as described in the model, perhaps because they seek to include an overt act requirement in the definition of a conspiracy. *See supra* at 4.

1 alleged conspiracy was ‘in the flow’ of interstate commerce, you must determine whether the activities
2 restrained an essential part of a real estate transaction across state lines. When the alleged conspiracy
3 occurs within the flow of interstate commerce, the magnitude of the commerce restrained is
4 unimportant.” *Id.* at 948. In denying defendant’s motion for acquittal, the court held that the jury found
5 that the “rigged sales were an essential part of those specific transactions” and that the funds from those
6 rigged sales moved “across state lines to the out of state banks.” *Id.* at 945-46.

7 The government’s proposed instruction concerning the “flow” theory of interstate commerce
8 mirrors the instructions used in *Guthrie*. These instructions refine the ABA Model Instructions by
9 providing a roadmap explaining to the jury what facts the government must prove to meet its burden to
10 show that the rigged sales at the foreclosure auctions were in the flow of interstate commerce. The
11 government requests the Court to use its proposed jury instruction to provide additional guidance to the
12 jury on what it must find for the government to prove the interstate commerce element of the charged
13 Sherman Act offense.

14 **IX. Response to Rule-of-Reason Instructions**

15 Defendants have proposed jury instructions 9 through 12 instructing the jury to apply the rule-of-
16 reason standard to this case in direct violation of this Court’s pretrial order. The Court has already held
17 that this case is a *per se* case and denied defendants’ motion to adjudicate under the rule-of-reason
18 standard. Pretrial Order, dkt. 186, at 1, ¶ 3. The government, therefore, requests that the jury not be
19 instructed to apply the rule-of-reason standard to this case and instead be instructed to apply the *per se*
20 standard in accordance with this Court’s previous order and over one hundred years of precedent. *See*
21 *e.g., United States v. Trenton Potteries*, 273 U.S. 392 (1927).

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1 **CONCLUSION**

2 The government respectfully requests that the Court provide the jury with the government's
3 proposed jury instructions.

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5 Respectfully submitted,

6 /s/

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8 Manish Kumar
9 Susan A. Musser
10 Albert B. Sambat
11 Ashley Eickhof
12 Trial Attorneys
13 Antitrust Division
14 U.S. Department of Justice
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